(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)
Puerto Rico Sun Oil Company, Inc.	) NPDES Appeal No. 92-20
Permit No. PR 0000400	)

[Decided October 23, 1992]

ORDER DENYING REVIEW

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum and Edward E. Reich.

PUERTO RICO SUN OIL COMPANY, INC.

NPDES Appeal No. 92-20

ORDER DENYING REVIEW

Decided October 23, 1992

Syllabus

Puerto Rico Sun Oil Company ("PRSOC") has petitioned for review of a denial of an evidentiary hearing request by EPA Region II. The request was made in conjunction with the issuance by Region II of a National Pollutant Discharge Elimination System ("NPDES") permit to the PRSOC refinery at Yabucoa, Puerto Rico.

The essence of the appeal is that the Regional Administrator erred in acting upon a July 24, 1990 Water Quality Certificate ("WQC") issued by the Puerto Rico Environmental Quality Board. The Region determined the WQC to be a valid certification under 40 C.F.R. §124.53, thus allowing the permitting process to proceed. (State certification or a waiver thereof is a precondition to issuance of an NPDES permit by EPA.) PRSOC asserts that the WQC was not "final" under Puerto Rican law, and thus could not provide the basis for a valid permit. PRSOC also raises various other legal and technical objections to the permit.

Held: The Regional Administrator properly denied the request for an evidentiary hearing. PRSOC's legal objections to the permit are not well-founded. While the WQC may be subject to further appeal under the Commonwealth's administrative and judicial process, it was legally effective on the date the permit was issued and thus the issuance of the permit was valid. PRSOC's technical objections are also not sustained because they variously either relate to conditions of the permit required to be included to conform it to the WQC, involve issues not previously raised in comments on the draft permit, or both. Therefore, the petition for review is denied.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum and Edward E. Reich.

Opinion of the Board by Judge Reich:

Puerto Rico Sun Oil Company ("PRSOC") seeks review of the denial of an evidentiary hearing request in conjunction with the issuance to it of a Clean Water Act National Pollutant Discharge Elimination System ("NPDES") permit by EPA Region II. The permit covers discharges of pollutants from the PRSOC facility in Yabucoa, Puerto Rico. The denial was appealed to the Board pursuant to the provisions of 40 CFR §124.91.

I. *Background*

The facts in this matter are not in dispute. On May 27, 1988, PRSOC submitted to EPA Region II a permit renewal application covering its Yabucoa petroleum refinery.[1] On October 31, 1988, EPA formally notified the Puerto Rico Environmental Quality Board ("EQB") of the application and requested that the EQB review the materials and provide the certification required by Section 401 of the Clean Water Act, 33 U.S.C. §1341, for that discharger. Certification by the Commonwealth, or a waiver of certification, is a prerequisite to the issuance of a permit by EPA.[2]

On August 11, 1989, EPA gave public notice of the draft permit for the PRSOC facility. One comment received on this draft was a letter from attorneys for the permittee which pointed out that the EQB had not yet issued a final Water Quality Certificate ("WQC") pursuant to Section §401 and that EPA could not issue the permit without a WQC unless it followed the provisions for waiver of State certification (AR, No. 15).[3] In response, Region II's Water Management Division Director acknowledged that no final WQC had yet been issued and that the Region did not intend to issue the permit prior to receipt of the final WQC. This letter also indicated Region II's intention "to finalize the permit promptly after receipt of the final WQC." (AR, No. 18).

On July 24, 1990, EQB issued a WQC to the permittee, with a copy to EPA (AR, No. 23). The WQC stated that there was a reasonable assurance that the discharges will not violate applicable water quality standards "if the limitations on Tables A-1, 2 are met. The conditions specified in the aforementioned tables shall be incorporated into the NPDES permit in order to satisfy the provisions of Sections 301(b)(1)(C) of the Act."[4] The WQC also stated that if PRSOC had any

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[1] At that time, the facility was owned by, and the application made in the name of, the Yabucoa Sun Oil Company ("YSOC"). Subsequently, as the result of a corporate transaction, YSOC changed its name to the Puerto Rico Sun Oil Company and the permit was transferred to PRSOC. For convenience, the name Puerto Rico Sun Oil Company, or PRSOC, will be used throughout this opinion.

[2] 40 C.F.R. §122.4 provides that "[n]o permit may be issued * * * when the applicant is required to obtain a State or other appropriate certification under section 401 of CWA and §124.53 and that certification has not been obtained or waived".

[3] All cites to the Administrative Record will be in the form of (AR, No. ____).

[4] Section 301(b)(1)(C) requires the achievement of:

> [A]ny more stringent limitation, including those necessary to meet water quality standards, treatment

(continued...)

objection to the "final WQC," it had a statutory right to request a reconsideration within 15 calendar days of the date of receipt of the WQC.

On August 17, 1990, PRSOC, through the Technical Consulting Group, filed an apparently timely request for reconsideration of the WQC (AR, No. 24). As will be discussed at length later in this opinion, it is the effect of this filing that is in dispute and is central to this appeal.

On August 21, 1990, Region II issued a revised public notice for the PRSOC permit, which incorporated the terms of the July 24, 1990 WQC. During the comment period, EPA received a letter from the EQB, which stated in part:

> This is to inform you that PRSOC, has requested a reconsideration of the final Water Quality Certificate (WQC) issued by the Environmental Quality Board (EQB) on July 24, 1990. This request is based on the fact that the permittee wants that the final WQC be revised in accordance to the new Water Quality Standard Regulation which became in effect on August 20, 1990. In addition, they want that EQB reconsider again the comments submitted to the Intent to Issue a Water Quality Certificate.
>
> At this moment, the EQB is under evaluation of the PRSOC petition.

(AR, No. 27). PRSOC, through its attorneys, also provided comments on the draft permit. In a September 10, 1990 letter (AR, No. 29), PRSOC stated that EPA should not proceed with permit issuance because PRSOC's request for reconsideration was still pending at the EQB. "Until such request is responded thereto by the state agency, the certification process cannot be deemed to have concluded." *Id.*

In a similar vein, PRSOC's attorneys sent a September 21, 1990 letter to Region II reasserting that "[u]ntil a decision on the reconsideration request is issued by the EQB, the Water Quality Certificate cannot be deemed finally effective." This letter outlined the legal support for this position (which will be discussed later) and requested the following:

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[4](...continued)

> standards, or schedules of compliance, established pursuant to any State law or regulations * * *.

> Thus, PRSOC respectfully requests that the permitting procedure be stayed until EQB finalizes its reconsideration. In the alternative, PRSOC requests that EPA comply with the procedures provided in the NPDES regulations for issuances of such permits without a finally effective State certification.
>
> Furthermore, the limits included in PRSOC's current NPDES permit, as modified in June 1987, should be maintained. Until mixing zone limits are incorporated into the permit, PRSOC would be exposed to enforcement actions and/or penalties for noncompliance with the limitations provided in the draft permit. However, should the current permit limitations be maintained, PRSOC would not be so exposed.

(AR, No. 32). Finally, the letter requested a fifteen-day extension to submit further technical comments, a request which was not granted.

PRSOC's primary concern was that because the EQB was engaged in a mixing zone validation study, the WQC established discharge limitations without a mixing zone.[5] PRSOC has stated that it is unable to achieve the permit limitations set forth in the new permit due to the lack of a mixing zone. Petition at 5. PRSOC also objected to the WQC because it allegedly failed to reflect changes made to the Water Quality Standards Regulations which underlie it.

On September 28, 1990, EPA issued the final permit (AR, No. 34) and gave public notice of its issuance on October 5, 1990 (AR, No. 35). The permit was premised on the validity of the July 24, 1990 WQC and reflected its terms. On November 7, 1990, PRSOC requested an evidentiary hearing on the permit pursuant to 40 C.F.R. §124.74 (AR, No. 37), which request was denied in its entirety by the Region II Regional Administrator on June 4, 1992 (AR, No. 44). This appeal followed.

II. *Discussion*

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[5] A mixing zone allows a person testing the effluent's effect on the receiving waters to collect samples downstream of the facility. Since the receiving water acts to dilute the effluent, the effluent could meet water quality standards at the outer edge of the mixing zone even if it would exceed those standards at the point of discharge. The "mixing zone" is thus the area of dispersal in the receiving waters where the pollutants are not sufficiently diluted to meet water quality standards.

Under the rules governing this proceeding, there is no appeal as of right from the Regional Administrator's decision. Ordinarily a petition for review is not granted unless the Regional Administrator's decision is clearly erroneous or involves an exercise of discretion or policy that is important, and should therefore be reviewed by the Environmental Appeals Board. *See, e.g., Miami-Dade Water and Sewer Authority Department*, NPDES Appeal No. 91-14, at 5 (EAB, July 27, 1992); *City of Jacksonville*, NPDES Appeal No. 91-19, at 4 (EAB, August 4, 1992); 40 C.F.R. §124.91(a) (57 *Fed. Reg.* 5336 (Feb. 13, 1992). The petitioner has the burden of demonstrating that review should be granted.

The petition for review asserts five bases to support review. These bases are as follows:

(1) The Regional Administrator erred in finding that the WQC issued by the EQB on July 24, 1990, was final;

(2) Puerto Rico did not waive its right to certify;

(3) EPA failed to respond to certain comments submitted by PRSOC on September 21, 1990;

(4) EPA did not consider new amendments to Water Quality Standards Regulations promulgated by EQB on July 20, 1990, in the issuance of the permit; and

(5) PRSOC has a number of technical objections to various permit conditions.

A. *Validity of the Water Quality Certificate*

Of these bases, the most significant and the primary focus of contention between PRSOC and Region II is the first, whether the Regional Administrator erred in concluding that the July 24, 1990 WQC was "final" so as to support the issuance of the final permit.

PRSOC bases its argument on the interpretation and application of the laws of Puerto Rico, most particularly the Public Policy Environmental Act, Law No. 9 of June 18, 1970, as amended (12 L.P.R.A. §1134) and the Uniform Administrative Procedure Act, Law No. 170 of August 12, 1988, as amended (3

L.P.R.A. §§211 et seq.). Both of these statutes provide for a motion for reconsideration of an agency resolution or order. Under Law No. 9, any person adversely affected by an EQB resolution, order or decision may file a petition for reconsideration. Such a petition for reconsideration is a prerequisite to seeking judicial review. As PRSOC correctly notes, this law further provides:

> The resolution or decision issued by the Board [upon reconsideration] shall be final and conclusive unless the party or parties adversely affected shall move the Superior Court of Puerto Rico, San Juan Part,for its review within the thirty (30) days following notice thereof.

12 L.P.R.A. §1134(d)(2). Therefore, PRSOC asserts that a resolution or decision, here the WQC, does not become truly final until either the decision of the EQB on the motion for reconsideration or, if that decision is appealed to the Superior Court, upon a decision of that body. Petition at 7-9. In the absence of a final WQC, and in the absence of a waiver of certification, the issuance of the permit was invalid.

At the request of this Board, Region II filed a response to the petition ("response"). In its response, the Region points to a provision of Law No. 9 which states:

> The filing of the petition for reconsideration will not exempt any person from complying with or obeying any decision or order of the Board, neither shall it in any way operate as a suspension or postponement of its effect, unless so ordered by the Board.

12 L.P.R.A. §1134(d)(1). The essence of the Region's response is that at the time of permit issuance, the Board had not suspended or postponed the effect of the WQC. Therefore, the WQC could serve as a basis for a valid permit. Response at 6.

The petition and response both discuss a resolution of the EQB dated November 28, 1990. This resolution reads in part:

> In order that it be determined that the Certificate of Water Quality in the case at bar be stayed pending the result of the reconsideration submitted before this Government Board. The Area of Water Quality shall take all such necessary measures to notify the Federal Environmental Protection Agency that the Certificate of Water Quality issued is not to become final and firm until the Board resolves the reconsideration submitted by the

> Puerto Rico Sun Oil Company pursuant to the Public Policy Environmental Act, 12 LPRA, 113D (sic) and pursuant to the Uniform Administrative Procedure Act, Act 170 of August 12, 1988, 3 LPRA 2101 *et seq*.

Board Resolution No. R-90-45-3, as quoted in the denial of the evidentiary hearing (AR, No. 44) at n.2. In the Region's view, this resolution operated to stay the WQC as of November 28, 1990, but that would not affect the status of the permit which had previously been issued based on the "valid" WQC. In PRSOC's view, this resolution constituted "a determination by EQB stating in writing what it (sic) was the legal status of this case *since the reconsideration was filed*; that the WQC issued by EQB was not final because it was being contested by PRSOC." Petition at 15.

PRSOC also points to the September 7, 1990 letter which the EQB sent to Region II during the comment period. PRSOC states that this letter informed EPA of the motion for reconsideration and the fact that the motion was being evaluated by the EQB. Region II does not contest this but points out that the letter did not state that the EQB had suspended or postponed the effect of the WQC.

While PRSOC does not agree that the WQC had not been stayed, it argues that in any event it doesn't matter if the provisions were stayed to determine whether the WQC is a final document. "What determines the finality of the WQC is if the issuance of said WQC by the State agency is contested or not in accordance with the State's laws and regulations." Petition at 12. PRSOC goes on to say that "if the WQC can be challenged in the State's administrative forum (as, in fact, it is being contested) it follows that it could not be final, and if the WQC is not final, the NPDES permit could not be issued under Section 401." Petition at 12-13.

This is the heart of PRSOC's argument and we believe it is flawed. PRSOC is confusing two separate questions. The first is whether the WQC is "final" in the sense that all appeal rights at the Commonwealth level have been exhausted. The second is whether it is "final" in the sense of being an effective certification upon which EPA could lawfully act. PRSOC appears to believe that the answer to the first question necessarily dictates the answer to the second. We disagree.

There is nothing in the statute or regulations which states that a certification cannot be effective prior to the exhaustion of appeals at the State level. To the contrary, we note that 40 C.F.R. §124.55(b) provides in pertinent part:

> If there is a change in the State law or regulation upon which a certification is based, *or if a court of competent jurisdiction or appropriate State board or agency stays, vacates, or remands a certification*, a State which has issued a certification under §124.53 may issue a modified certification or notice of waiver and forward it to EPA. If the modified certification is received before final agency action on the permit, the permit shall be consistent with the more stringent conditions which are based upon State law identified in such certification. *If the certification or notice of waiver is received after final agency action on the permit*, the Regional Administrator may modify the permit on request of the permittee only to the extent necessary to delete any conditions based on a condition in a certification invalidated by a court of competent jurisdiction or by an appropriate State board or agency.

(Emphasis added.) This provision discusses what happens if a court or State agency stays, vacates or remands a certification after the State has already certified. It even envisions circumstances where this could occur after the permit, based on that certification, has already been issued. This circumstance could not occur if PRSOC were correct that if a certification were challenged in a State administrative forum, a permit could not be issued because that certification was not final.

Thus, we find PRSOC's argument as to the "finality" of the WQC largely off the mark. We believe the issue is more correctly framed in terms of the effectiveness of the WQC on the date of permit issuance.

The key provision in this respect, as Region II correctly notes, is 12 L.P.R.A. §1134(d)(1). That provision is quite explicit that the filing of a motion for reconsideration shall not "in any way" operate as a suspension or postponement of the effectiveness of the Board order or decision "unless so ordered by the Board." We find no such suspension of postponement was in effect at the time of permit issuance.

The September 7, 1990 letter in no way purports to be a suspension or postponement. The November 28, 1990 resolution did stay the WQC, but this was fully two months after permit issuance. We recognize that PRSOC asserts that this resolution was intended to confirm the legal status of the case "since the reconsideration was filed." However, the resolution is at best ambiguous and there is no EQB action prior to September 28, 1990, which would confirm that a suspension or postponement was in effect on that date. In addition, the legal status

to which PRSOC refers is the availability of further administrative review which, as previously noted, is not the determining factor.

We, therefore, find that the WQC was effective on September 28, 1990, the date the permit was issued, and provided a valid basis for the permit.

PRSOC also makes three additional points in support of their argument as to the finality of the WQC which should be addressed briefly. First, PRSOC discusses at length the important role of the States under the Clean Water Act and their fundamental role in the certification process. PRSOC argues that by making a determination that the WQC was "final" and "valid," "the Regional Administrator unlawfully and unilaterally vested himself with the authority and prerogatives that were granted by Congress to the State's administrative and judicial system." Petition at 11.

That the State has a very important role, through the certification process, in the issuance of NPDES permits by EPA is undisputed. In this case, due deference was given to the Commonwealth. It was the EQB which issued the WQC in question. It was the EQB which described the WQC as "final." It was the EQB which did not stay the effectiveness of the WQC until November 28, 1990, despite the obvious intention of Region II to use the WQC for final permit issuance, as evidenced by the August 21, 1990 public notice on the draft permit. Region II only acted to incorporate the terms of the WQC into its permit, as it is required by law to do.[6] Further, if the terms of the WQC are ultimately changed on appeal, 40 C.F.R. §124.55(b) allows the EQB to seek appropriate changes to the permit. In no way does the Region's action constitute a usurpation of State authority or prerogatives.

Second, PRSOC argues that in focusing on whether the WQC had been stayed as of the date of permit issuance, Region II ignores the fact that there was no reason for PRSOC to seek a stay since the conditions in the WQC were not yet enforceable. The WQC conditions were not "self-executing" and were not effective until incorporated into a valid permit. Petition at 14.

As this case has shown, PRSOC is mistaken. Under 12 L.P.R.A. §1134(d)(1), the filing of the petition for reconsideration did not "in any way" operate as a suspension or postponement of the effect of the WQC. Based on the

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[6] 40 C.F.R. §122.44(d) requires an NPDES permit to conform to and incorporate any conditions certified by a State agency under 40 C.F.R. §124.53.

WQC, Region II clearly indicated its intention to proceed with final permit issuance. PRSOC obviously knew, and commented upon, this intention. It is hard to understand why, under these circumstances, PRSOC concluded that "the issue to stay or not to stay said conditions was meaningless throughout that period." *Id*. While it may have been meaningless under PRSOC's view of the law, it was obvious that Region II felt otherwise and PRSOC could have sought to protect its interests by seeking a stay from the EQB immediately upon its filing of the petition for reconsideration. It did not, and must accept the consequences.

Finally, PRSOC asserts that the action of Region II precludes PRSOC from contesting the WQC in the State's administrative and judicial system. This action "voids and moots" the EQB proceeding, thus depriving PRSOC of its Constitutional right to due process. Petition at 14-15.

PRSOC is incorrect in this assertion, largely because, as previously noted, it confuses what is at issue here. Region II has not purported to make any determination as to the ultimate substantive correctness of the WQC. Both parties agree that this is a matter to be determined solely by the State administrative and judicial process.[7] Region II has only acted on a WQC which was both final and valid, while recognizing that subsequent State action could ultimately affect its actions.

PRSOC seems to ignore that EPA regulations directly address the circumstances where a certification is stayed, vacated or remanded after permit issuance. As provided in 40 C.F.R. §124.55(b), as previously quoted, the regulations allow for a modified certification reflecting any subsequent State action which can be used as a basis for an appropriate permit modification. This process was described to EQB by Region II in a letter of May 17, 1991 (AR, No. 43). Thus, PRSOC can continue to pursue its appeal through the State process and the

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[7] 40 C.F.R. §124.55(e) provides that "[r]eview and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State and may not be made through the procedures in this part."

permit can be modified accordingly if it ultimately proves necessary.[8] Therefore, the State proceeding is not mooted and there is no deprivation of due process.[9]

For all these reasons, the denial of the evidentiary hearing request on this issue was proper and the appeal is not sustained.

B. *Waiver of Certification*

PRSOC's petition sets forth as a second basis for review that the Commonwealth did not waive its right to certification. PRSOC is correct but that is immaterial. Region II's action was premised on the Commonwealth's certification, not a waiver of certification. PRSOC's argument would be relevant only if we found that there was no valid State certification on which Region II could act. Having found the July 24, 1990 WQC to be a valid basis for the September 28, 1990 permit, this issue is moot and the denial of the hearing request was proper.

C. *Failure to Respond to Comments*

PRSOC has alleged that Region II failed to respond to its comments submitted on September 21, 1990 (AR, No. 32). More specifically, PRSOC notes that in those comments, PRSOC requested that the permit limits included in PRSOC's then-current NPDES permit, modified in June 1987, be maintained. It is this comment to which PRSOC alleges that Region II failed to respond.

Region II, in the denial of the evidentiary hearing request (AR, No. 44), cites its response to public notice comments document (AR, No. 33), response number 6, which it states "generally addressed PRSOC's comment." In that response, the Region discussed its view of the validity of the WQC as a basis for the issuance of the permit.

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[8] We recognize that the EQB has now stayed the WQC. However, there is nothing in the record to suggest that a modified certification has been submitted to Region II under 40 C.F.R. §124.55(b). It is clear that Region II cannot act on a modified certification, even if one were issued, until it is officially submitted. *Miners Advocacy Council*, NPDES Appeal No. 91-23, at 7 (EAB; May 29, 1992).

[9] PRSOC expresses a concern that any proposed modification based on a modified WQC would be precluded from relaxing the limitations in the September 28, 1990 permit because of the anti-backsliding provisions of the law. CWA §402(o) and 40 C.F.R. §122.44(l). These provisions require that, in general, when a permit is renewed, or reissued or modified, that permit must contain effluent limitations which are no less stringent than comparable effluent limitations in the previous permit. However, the statute and regulations provide exceptions which could be applicable in this context. We decline to find that the modification provision in 40 C.F.R. §124.55(b) is effectively nullified by the application of 40 C.F.R. §122.44(l).

In the evidentiary hearing denial, Region II elaborated that "[w]ith a valid WQC in hand, EPA was obligated to include in the final NPDES permit requirements necessary to conform to the conditions of the WQC (40 CFR §122.44(d)(3)) and not simply maintain the conditions of a previously issued permit." AR, No. 44 at 12. In its petition, PRSOC takes objection to this statement, based on its view of the invalidity of the Region's action.

While we find that Region II could have addressed PRSOC's comment more completely in its response to comments document, we believe this was at worst harmless error. As will be seen in the next section of this opinion, Region II's basic legal premise is correct. In addition, it is clear in context that PRSOC is merely using this basis to rearticulate its central point about the supposed invalidity of the Region's reliance on the WQC, a point we have already addressed at length. Therefore, we find no error in the denial of the evidentiary hearing request on this basis.

D. *Failure to Consider Amendments to Water Quality Standards Regulations*

According to the petition, and unchallenged by the Region, the Water Quality Standards Regulations ("WQSR") which formed the basis for the WQC underlying the permit were amended on July 20, 1990. As represented by PRSOC, the amended WQSR specifies that the water quality standards are not applicable to effluent but rather to the receiving water body. "Henceforth, the standards will no longer be applied at the end of the pipe, as was done in the case at hand." Petition at 19. This was, in fact, one of the bases for PRSOC's motion for reconsideration of the WQC to the EQB.

In its response to this issue in the denial of the evidentiary hearing request, the Region reiterated its position that the WQC was final and adequate and "therefore, any requirements which EQB included in the final WQC such as end-of-pipe water quality-based limits are required to be included in the final NPDES permit." AR, No. 44 at 13. The Region goes on to point out the process for modification of a permit based on a modified certification.

It has been held repeatedly that EPA must include the conditions in a State certification without inquiring as to whether they are proper or too stringent. *Lone Star Steel*, NPDES Appeal No. 91-5, at 3 (CJO, November 25, 1991); *Champion International Corp.*, NPDES Appeal No. 90-1, at 6 (CJO, September 5, 1990); *see also, Roosevelt Campobello International Park Commission et al. v. U.S. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982).

By PRSOC's own admission, the WQC issued by EQB reflected the WQSR prior to the cited amendment. As such, the Region had no choice but to frame its permit based on the regulation as it stood prior to the amendment. To have done otherwise would have constituted an impermissible looking behind the certification. If the EQB believes that the WQC should be changed in light of amendments to the WQSR, it may modify the WQC, allowing for a possible permit modification. (To the extent that PRSOC finds the permit modification process inapplicable because there is no currently valid permit, we have already rejected that argument. To the extent that it is concerned that the anti-backsliding provision would preclude a subsequent modification, see note 9 *supra*.)

Therefore, the denial of the request for an evidentiary hearing on this basis was proper and the appeal is denied.

E. *Technical Objections*

PRSOC also identifies 35 technical objections to the permit, dealing with effluent limitations, monitoring requirements, and other matters. Region II, in its response to the petition, asserts that review of each of these objections should be denied because it either relates to a condition included in the WQC, or was not raised during the public comment period, or both.

As discussed in the previous section, EPA has no authority to look behind the WQC to determine whether the conditions contained therein are overly stringent. To the extent that the conditions are included in the WQC, Region II was required to include them in the permit.[10] Under these circumstances, denial of the evidentiary hearing request for these objections was appropriate. We find this to be the case for 25 of the technical objections. These are the objections listed in the petition on pages 21 and 22 as 1e, 1g, 1h, 1j, 1k, 1l, 1m, 1n, 1o, 1p, 1q, 1r, 1s, 1t, 1u, 2b, 3a, 3b, 3c, 3d, 3e, 3f, 3g, 3i, and 3j.[11]

The other reason given by Region II for its denial of the evidentiary hearing request was the failure of PRSOC to raise the technical objections for which a hearing was being sought during the public comment period on the draft permit. The Region cites 40 C.F.R. §124.76, which provides in part:

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[10] *See* note 6, *supra*.

[11] Region II, in its response to the petition, also lists objection 1i (total chromium) in this category. However, a review of the WQC does not confirm this. This condition was included by Region II based on the technology-based effluent guidelines described in 40 C.F.R. §419.43 (Petroleum Refining Point Sources). See the letter from Region II to the EQB dated June 22, 1989 (AR, No. 7) in this regard.

> No issues shall be raised by any party that were not submitted to the administrative record required by §124.18 as part of the preparation of and comment on a draft permit unless good cause is shown for the failure to submit them.

See Miners Advocacy Council, NPDES Appeal No. 91-23, at 10-11 (EAB, July 27, 1992).

PRSOC disputes the Region's assertion, citing its two letters of comment on the draft permit and its letter to the EQB requesting reconsideration of the WQC. It also argues that even if it is found to have failed to comment, it had good cause for its failure to do so.

As previously discussed, PRSOC's comments on the draft permit focused almost entirely on the issue of the "finality" of the WQC. The only technical comment related to PRSOC's request to continue the limits from the then-current permit rather than those reflected in the WQC. The letter to the EQB also, of necessity, focused on the terms of the WQC.[12] All of the issues raised by these letters relate to conditions which were included in the permit to be consistent with the WQC, and thus are covered by the previous discussion.

The remaining technical objections were not made during the preparation of and comment on the draft permit. As such, the Region is correct that, in the absence of good cause shown, they cannot be raised for the first time in the request for an evidentiary hearing. These objections are those denominated as 1a, 1b, 1c, 1d, 1f, 1i, 1v, 2a, 3h, and 3k.

PRSOC states that there is good cause to excuse any failure to submit comments because "it was totally unexpected that the Regional Administrator, being given notice by petitioner and the EQB that the WQC was subject to reconsideration, would act contrary to the law by issuing an NPDES permit without the issuance of a final WQC." Petition at 24. We find that this does not establish good cause.

Good cause, as that term is used in 40 C.F.R. §124.76, includes:

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[12] While not significant to this decision, and contrary to PRSOC's assertion, we do not believe that this letter is part of the administrative record for the permit.

> [T]he case where the party seeking to raise the new issues or introduce new information shows that it could not reasonably have ascertained the issues or made the information available within the time required by §124.15; or that it could not have reasonably anticipated the relevance or materiality of the information sought to be introduced.

PRSOC was well aware that Region II was proceeding with issuance of a permit based on the July 24, 1990 WQC, notwithstanding PRSOC's view of the law. It submitted two comment letters on this point. In the second letter it requested, belatedly, an extension of time to submit technical comments, which request was denied. It could hardly be concluded that the technical issues could not have been reasonably ascertained or their relevance or materiality reasonably anticipated. PRSOC's failure to provide its technical objections along with its legal argument cannot be excused under the rubric of good cause.

Therefore, there are no technical objections that were properly preserved for review that do not go to requirements of the permit mandated by the WQC. As such, the denial of the evidentiary hearing request on this basis was proper.

III. *Conclusion*

For all the reasons previously discussed, we find that the Regional Administrator did not err in denying the request for an evidentiary hearing. Accordingly, the petition for review is denied.

So ordered.